

IT 95-22

Tax Type: INCOME TAX

Issue: Withholding Tax - Failure To File Return/Make Payment

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
ADMINISTRATIVE HEARINGS DIVISION
CHICAGO, ILLINOIS

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DEPARTMENT OF REVENUE      )  
STATE OF ILLINOIS         )  
                           )   Docket:  
      v.                   )  
                           )  
XXXXXX                    )  
                           )   Wendy S.  Paul  
                           )   Admin. Law Judge  
      Taxpayer(s)         )  
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RECOMMENDATION FOR DISPOSITION

SYNOPSIS: This matter involves the taxpayer's liability for Illinois income taxes withheld from compensation paid to employees and not paid over to the Department of Revenue (hereinafter referred to as the "Department") under 35 ILCS 5/704 and 5/705 and for penalties under 35 ILCS 5/1001 and 5/1002.

On August 8, 1994, the Department issued a Notice of Deficiency for taxes and penalties arising out of taxpayer's failure to pay over to the Department amounts withheld as Illinois Income Taxes from compensation paid to its employees for the first and third calendar quarters of 1985.

On August 23, 1994, taxpayer filed a timely protest to the Notice of Deficiency. In its protest, taxpayer raised the statute of limitations as an affirmative defense to the Department's Notice. Taxpayer did not claim, in its protest, that returns had been filed or that the amounts had been paid to the Department.

Taxpayer did not request a hearing. Accordingly, this case will be determined without an evidentiary hearing, based upon the administrative file.

FINDINGS OF FACT:

1. The Department issued a Notice of Deficiency on August 8, 1994.
Dept. Ex. No. 1

2. Taxpayer filed a timely protest on August 23, 1994. Dept. Ex.
No. 2

3. The Department's Notice sought to assess taxes and penalties arising out of taxpayer's failure to file returns and its failure to pay over to the Department amounts withheld from compensation paid to its employees as required by 35 ILCS 5/704 for the first and third quarters of 1985. Dept. Ex. No. 1

4. In his protest, Taxpayer did not allege that the returns had been filed or that the amounts had been paid to the Department, but alleged that the Department's Notice was barred by the statute of limitations. Dept. Ex. No. 2

5. For the subject tax quarters, taxpayer did not file quarterly Illinois Withholding Tax Returns (Forms IL-941) or pay to the Department the amounts which it withheld from compensation paid to its employees. Dept. Ex. No. 1

CONCLUSIONS OF LAW: Limitations on notices of deficiency are set by statute. There is one statutory section (35 ILCS 5/905(j)) which applies to withholding tax situations, but, by its express terms, applies only to those withholding tax situations where returns have actually been filed. There is also a general three year limitation period which is set out by 35 ILCS 5/ 905(a). The instant case, however, is controlled by 35 ILCS 5/905(c). This statutory section provides an exception to the general three-year period of limitations and applies where, as here, no withholding tax returns for the quarters at issue were ever filed. Under such circumstances, a notice of deficiency may be issued at any time. 35 ILCS 5/905(c); Mitchell v. Illinois Department of Revenue, 230 Ill.App.3d 795 (1st Dist. 1992). Accordingly, the instant notice of deficiency was not barred by statute.

In its protest, Taxpayer did not address the issue of the penalties

proposed pursuant to 35 ILCS 5/1001 and 5/1002 and the file contains no evidence to overcome the Department's prima facie case or to provide a basis for the abatement of such penalties.

RECOMMENDATION: The Administrative Law Judge recommends that the Director of Revenue issue his Notice of Decision upholding the Notice of Deficiency in its entirety.

Wendy S. Paul
Administrative Law Judge

April 14, 1995